

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
A.V.S. LAMINATES, INC.	:	
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	DETERMINATION
for the Period June 1, 1990 through May 31, 1996.	:	DTA NOS. 819295

AND 819301

In the Matter of the Petition	:
of	:
STEIGER BOAT SALES, INC.	:
for Revision of a Determination or for Refund of Sales	:
and Use Taxes under Articles 28 and 29 of the Tax Law	:
for the Period June 1, 1995 through May 31, 1996.	:

Petitioner A.V. S. Laminates, Inc., 99 Bellport Avenue, Bellport, New York 11713, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1990 through May 31, 1996.

Petitioner Steiger Boat Sales, Inc., 99 Bellport Avenue, Bellport, New York 11713, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1995 through May 31, 1996.

A consolidated hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 5, 2003 at 10:30 A.M., and continued to conclusion on November 18, 2003 at 10:00 A.M., with

all briefs to be submitted by May 5, 2004, which date began the six-month period for the issuance of this determination. Petitioners appeared by Kestenbaum & Mark (Richard S. Kestenbaum, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly subjected certain sales made to New York customers by petitioner A.V.S. Laminates, Inc. to sales tax.

II. Whether the Division of Taxation properly subjected sales made by petitioner Steiger Boat Sales, Inc. to sales tax.

III. Whether the Division of Taxation has established that petitioners were properly subject to the imposition of a fraud penalty and, if not, whether the penalty pursuant to Tax Law § 1145(a)(1) should be sustained.

FINDINGS OF FACT

1. Petitioner A.V.S. Laminates, Inc. ("A.V.S."), doing business as Steiger Craft, manufactures and sells fiberglass boats for use in salt water and fresh water by, among others, sports fishermen and commercial fishermen, governmental agencies (Federal, states and municipalities), utilities and marine businesses. A.V.S. is located at 99 Bellport Avenue, in Bellport, New York, on Long Island, about 8 to 10 miles from the ocean. The Bellport property consists of a showroom building containing an office, and four buildings directly behind that showroom building. Three of the buildings are used for manufacturing boats and the fourth building is used for offices where the books and records are located.

2. Alan V. Steiger is the sole shareholder and sole officer of A.V.S. Mr. Steiger, a high school graduate, has been designing and building boats for many years.¹ Initially, he built

¹ The record is silent as to the exact year Mr. Steiger began designing and building boats.

commercial clam rakes in boats, i.e., nets and other items used in commercial fishing, then he began building fiberglass boats as well. On or about 1980, his company, Steiger Clamming Supplies, obtained a government contract to manufacture fiberglass solar systems for it. However, Steiger Clamming Supplies was unable to invoice the government because of its name and, as a result, A.V.S. Laminates, Inc. was incorporated in 1980. The corporation's name is a combination of Mr. Steiger's three initials and the type of manufacturing the corporation performs.

3. Prior to the period in issue, A.V.S. conducted a manufacturing and wholesale business with marine dealers including three Steiger Craft boat dealers on Long Island. After the recession of 1989 to 1991, during which the three Steiger Craft boat dealers on Long Island closed, A.V.S. began selling its boats directly to the ultimate boat owner in addition to continuing its business with various marine businesses. A.V.S. did not collect sales tax from its retail customers. Rather, those customers were instructed to pay the sales tax at the New York State Department of Motor Vehicles ("DMV") when they registered their boats. In August 1991, after receiving complaints from its customers about difficulties they had registering their boats with the DMV, A.V.S. began collecting sales tax from its retail boat sales and registering boats for its customers.

4. From 1991 until the summer of 1993, A.V.S. employed Fran Waller as its bookkeeper. Among her duties as A.V.S.'s bookkeeper, Ms. Waller prepared sales tax returns and checks for Mr. Steiger's signature. Mr. Steiger ultimately decided which creditors were paid and what checks were mailed out in payment of A.V.S.'s bills.

5. In the summer of 1993, Allan Suchman, C.P.A., was hired to review A.V.S.'s books and records. Mr. Suchman found A.V.S.'s records to be in disarray. He also found that A.V.S. had not filed sales tax returns or paid its sales tax liabilities. After consultation with Mr. Steiger, Mr.

Suchman anonymously contacted the Division of Taxation (the "Division") to ascertain whether the delinquent returns could be filed and a payment plan worked out. The Division's employee informed Mr. Suchman that if the returns were filed without payment, a lien would be filed for the outstanding tax liabilities. Mr. Suchman further explained that if a lien was filed his client would be unable to get a loan it wanted to obtain. The Division's employee reiterated that the tax warrant would be filed if the delinquent returns were filed without an accompanying tax payment. Mr. Suchman discussed the matter with Mr. Steiger. A.V.S. was unsuccessful in obtaining financing.

6. During the period June 1, 1990 through May 31, 1995, A.V.S. manufactured and sold boats. Although it was registered as a sales tax vendor with the Division, A.V.S. did not file sales tax returns for the period June 1, 1990 through May 31, 1995. It also did not file New York withholding tax returns for the period June 1, 1990 through May 31, 1995.

7. During the period June 1, 1990 through May 31, 1996, rather than remitting the sales tax collected by A.V.S., Mr. Steiger used the money to keep the business afloat. In January 1994, A.V.S. repaid Mr. Steiger's mother, Josephine Steiger, \$54,855.16 in principal and interest on a loan it owed her. In addition to its other debts, A.V.S. owed Federal taxes. Mr. Steiger chose to pay that debt rather than A.V.S.'s sales tax liability.

8. During the period in issue, A.V.S. manufactured about 20 different models of boats, in 6 lengths, i.e., 16 feet, 19 feet, 21 feet, 23 feet, 25 feet and 26 feet, with three different models in each of the larger lengths.² Some of the models which A.V.S. manufactured included as standard equipment inboard - outboard engines, and the remaining models were pre-rigged with steering cables for use with outboard motors. However, during the early part of the audit period,

² Boat models included, among others, the Hunky Dory (16 ft.), the South Bay Molly (19 ft.), the Center Console Sport Fish (21 ft., 23 ft.), the Block Island (21 ft., 23 ft.), the Miami (23 ft.), the Long Beach (23 ft.) and the Chesapeake (21 ft., 23 ft., 25 ft.).

A.V.S. was unable to supply the outboard motors to the purchasers of its boats because it was an original equipment manufacturer (“OEM”) and the manufacturers of the outboard motors would not sell their products to OEMs, such as A.V.S. On or about June 1995, petitioner Steiger Boat Sales, Inc. (“Steiger Boat”) was incorporated when Mr. Steiger was able to become a Mercury engine and parts dealer.³ During the period June 1, 1995 through May 31, 1996, Mr. Steiger was the sole shareholder and officer of Steiger Boat.

9. During the period June 1, 1995 through May 31, 1996, Steiger Boat sold boats out of the same Bellport, New York location as A.V.S. Between June 1, 1995 and May 31, 1996, A.V.S. sold boats to Steiger Boat without charging sales tax. Even though Steiger Boat failed to give A.V.S. any resale certificates, A.V.S. considered these as sales for resale and therefore nontaxable. Steiger Boat charged sales tax to the customer on its own sales invoices. Steiger Boat did not register as a sales tax vendor with the Division and did not file sales tax returns for the period June 1, 1995 through May 31, 1996. Steiger Boat did not file New York franchise tax reports for the period June 1, 1995 through May 31, 1996.

10. Steiger Boat did not maintain its own checking account. Rather, only A.V.S. maintained a checking account. A.V.S./Steiger Boat did not remit the sales tax due during the period June 1, 1995 through May 31, 1996 for sales made by Steiger Boat.

11. After the summer of 1993, Mr. Suchman continued to provide A.V.S. with accounting services. Once Steiger Boat was incorporated, Mr. Suchman also provided accounting services to it. Mr. Suchman was aware of Steiger Boat’s obligation to register as a sales tax vendor.

12. In July 1996, after receiving an anonymous letter which alleged that A.V.S. was selling boats at retail without filing sales tax returns, the Division assigned an auditor, David Fitzgerald, to conduct a sales tax field audit of A.V.S. for the period June 1, 1990 through May

³ The record is silent as to the exact date of Steiger Boat Sales, Inc.’s incorporation.

1, 1996. An appointment letter dated July 18, 1996 and setting an appointment for August 12, 1996 was sent by Mr. Fitzgerald to A.V.S. The letter requested that the corporation make available all of its books and records pertaining to its tax liability for the period under audit, including financial statements, journals, ledgers, sales invoices, cash register tapes, sales and use tax returns, Federal income tax returns and exemption certificates.

13. At the written request of A.V.S., the field audit appointment was rescheduled for October 28, 1996. Mr. Fitzgerald met with Messrs. Steiger and Suchman on October 28, 1996. At that meeting, they admitted that A.V.S. had collected sales tax for the period June 1, 1990 through May 31, 1996 but that it had not remitted the sales tax monies.

14. A review of the Tax Field Audit Log ("audit log") reveals that the auditor began his detailed audit of A.V.S.'s sales records on October 28, 1996 by spending six days in October 1996 and November 1996 transcribing its sales invoices for the period June 1, 1990 through May 31, 1996. Review of the audit log also reveals that on November 19, 1996 he analyzed all available exemption certificates. The exemption certificates provided were resale certificates. Based on his analysis of these resale certificates, which he deemed to be sufficient, the auditor concluded that some of A.V.S.'s sales were exempt from sales tax.

15. As he continued his audit, Mr. Fitzgerald made additional written and oral requests for A.V.S.'s records including exemption certificates. On February 5, 1997, Mr. Fitzgerald prepared a copy of the listing of all A.V.S.'s invoices for the period June 1, 1990 through May 31, 1996 that included, among other things, for each transaction: the customer's name, the date of the transaction, the invoice number, the invoice amount, the taxable amount, the tax paid, additional tax due and the auditor's comments concerning the transaction such as: no sales tax charged - NJ; no sales tax charged - exempt; and sales tax charged, not paid. During a February 7, 1997 field appointment, Mr. Fitzgerald gave Mr. Suchman a copy of the listing of all A.V.S.'s sales

invoices, so that A.V.S. could provide substantiation for any sales which it considered to be exempt. On February 10, 1997, the auditor sent a letter to A.V.S.'s accountant requesting, among other things, purchase invoices, bank statements and "[a]ll exemption certificates to verify non-taxable sales." Notations in the audit log reveal that, during a June 7, 1997 field audit appointment, in response to the auditor's request for additional exemption certificates, both Mr. Suchman and Karen Andrews, A.V.S.'s purchasing agent and bookkeeper, stated that there were no additional exemption certificates available. During the June 7, 1997 audit appointment, Mr. Steiger admitted that petitioners did not file the sales tax returns because they did not want the Division to file any tax warrants. He also admitted that petitioners used the sales tax money to pay other creditors. In a telephone conversation with Mr. Fitzgerald, Mr. Suchman admitted that Steiger Boat collected sales tax but did not remit these funds to the Division.

16. Between October 28, 1996 and June 2, 1997, the auditor examined the records provided by A.V.S. including, among other things, all sales invoices for the period June 1, 1990 through May 31, 1996, some exemption certificates (resale certificates), copies of Federal income tax returns for the fiscal years September 1, 1990 through September 30, 1995, bank statements for various accounts located in North Fork Bank, Marine Midland Bank and The Bank of New York, cancelled checks payable to Josephine Steiger in the month of January 1994, cash disbursements for miscellaneous dates and cash receipts for miscellaneous dates.

17. After reviewing A.V.S.'s sales invoices and the admissions made by its representatives, in July 1997, the auditor prepared and forwarded a Referral of Possible Fraud ("fraud referral") pertaining to A.V.S. to the Revenue Crimes Bureau. A review of the fraud referral reveals that Mr. Fitzgerald described A.V.S.'s record-keeping as poor. The Revenue Crimes Bureau accepted the case for investigation.

18. On September 7, 1997, the Revenue Crimes Bureau issued a subpoena duces tecum to A.V.S. for all sales invoices, purchase invoices, purchase journals, bank statements, cancelled checks and all other accounting and bookkeeping records and exemption certificates regarding the business activity of A.V.S. for the period June 1, 1990 through May 31, 1996.

19. On or about September 24, 1997, in response to the subpoena, A.V.S. handed over boxes of records to a representative from the Revenue Crimes Bureau. At the same time, Steiger Boat also handed over its records to the Revenue Crimes Bureau. Neither Mr. Steiger nor Mr. Suchman received a receipt from the Revenue Crimes Bureau enumerating the records being taken. Neither A.V.S. nor Steiger Boat retained copies of its records before handing them over to the Revenue Crimes Bureau.

20. After the Revenue Crimes Bureau assigned an investigator, Michael Ou, to handle A.V.S.'s criminal investigation, Mr. Fitzgerald sent Mr. Ou a set of the initial work papers that he prepared during the civil audit of A.V.S.⁴ Mr. Fitzgerald did no further work on the civil audit of A.V.S. until the criminal case was closed.

21. After the criminal investigation began, Mr. Ou met with Mr. Suchman at the Revenue Crimes Bureau office at Two World Trade Center. At that meeting, Mr. Ou presented petitioners' representative with a list of items in question.

22. After reviewing A.V.S.'s records, Mr. Ou initially determined that on A.V.S.'s total taxable sales of \$4,761,884.64 for the period June 1, 1990 through May 31, 1996, it had collected and failed to remit sales tax in the amount of \$182,663.32 and had additional uncollected (undercharged or uncharged) sales tax in the amount of \$212,088.82 for total tax due of \$394,752.14. After reviewing Steiger Boat's records, Mr. Ou initially determined that on Steiger Boat's total taxable sales of \$758,651.83 for the period June 1, 1995 through May 31,

⁴ Mr. Ou also handled Steiger Boat's criminal investigation.

1996, it had collected and failed to remit sales tax in the amount of \$58,432.32 and had additional uncollected (undercharged or uncharged) sales tax in the amount of \$4,662.81 for a total tax due of \$63,080.30. Mr. Ou prepared detailed work papers supporting his initial determinations of total sales tax due for both petitioners.

23. In early 2000, Mr. Suchman brought Mr. Ou some resale certificates and some invoices indicating out-of-state sales. The proof of out-of-state deliveries were invoices bearing out-of-state addresses. Mr. Suchman did not prepare a cover letter transmitting these documents. Neither a list of documents being transmitted nor a schedule of the adjusted tax due based on the documents being transmitted was prepared. Mr. Suchman also failed to copy the documents that he submitted to Mr. Ou.

24. In late April or early May 2000, in an effort to further reduce Mr. Ou's determination of tax due on unsubstantiated exempt sales, Mr. Suchman again met with Mr. Ou. Over several days, Mr. Ou provided Mr. Suchman with copies of the invoices that were in question. Mr. Suchman was also allowed to go over all the documents in Mr. Ou's possession. Subsequently, Mr. Suchman met with Mr. Steiger and explained what he would need to show to reduce the asserted determinations of tax due on unsubstantiated exempt sales. Discussions were then held with Ms. Andrews and a plan was formulated. While Mr. Suchman supervised Ms. Andrews and temporary employees, Mr. Steiger was not involved in the implementation of the plan.

25. Since A.V.S.'s unsubstantiated exempt sales consisted of four types of sales, each type of sale was assigned its own part with supporting material gathered for each part. Part one are retail sales made in the State of New York. For these retail sales, A.V.S. contacted all the people who had paid the sales tax at the DMV when they registered their boats. In response, it received copies of sales tax receipts, copies of cancelled checks, copies of registration certificates or some combination of those depending on the person. Part two are wholesale sales made in the State of

New York. For these wholesale sales, A.V.S. obtained resale certificates and exemption certificates from virtually everybody listed on the invoices. Part three are all sales made outside of the State of New York. For these sales, A.V.S. obtained letters, advertising brochures, yellow page ads and other types of documentation. A great deal of time was devoted to providing supporting documentation for this type of sales. For part four, the “everything else” category, A.V.S. obtained documentation for, among other things, boats taken in trade.

25. After all the documents were gathered, in the late summer of 2000, Mr. Suchman hand delivered a box and a folder containing them to Mr. Ou. Mr. Suchman did not prepare a cover letter transmitting the documents. Neither a list of documents being transmitted nor a schedule of the adjusted tax due based on the documents being transmitted was prepared. Mr. Suchman also failed to copy the documents that he submitted to Mr. Ou.

26. On December 13, 2000, Mr. Steiger pled guilty in New York State, Suffolk County Court, to a superior court information charging the Class D felony of Grand Larceny in the Third Degree, in violation of New York Penal Law § 155.35. In the plea proceeding, Mr. Steiger admitted that he was the owner of A.V.S. and Steiger Boat, between June 1, 1990 and May 31, 1996; that he collected sales tax for the sales of certain boats by A.V.S. and Steiger Boat, during the period between June 1, 1990 and May 31, 1996; that he failed to remit that tax to the Division; that the tax collected but not remitted amounted to \$241,095.00; and that he knew it was wrong to fail to remit that tax. Of the amount of tax which Mr. Steiger admitted he failed to remit, \$182,663.00 was attributable to tax billed or collected by A.V.S. and \$58,432.00 was attributable to tax billed or collected by Steiger Boat. The record of the plea proceedings indicates that Mr. Steiger’s attorney was aware that the Division planned on pursuing additional civil tax liabilities.

27. On February 7, 2001, the Honorable Joseph Farneti, County Court Judge for Suffolk County, sentenced Mr. Steiger to five years probation based upon the aforesaid plea of guilty. Judge Farneti stated that Mr. Steiger's guilty plea "is in no way to impact upon any civil remedies the State of New York may have against Mr. Steiger, and they are free to pursue those remedies." As part of the plea agreement, Mr. Steiger paid the Division the sum of \$241,095.00.

28. On March 20, 2001, Mr. Ou sent an e-mail to Mr. Fitzgerald informing him of the disposition of the criminal case against A.V.S. and Steiger Boat and asking him to close the case using attached schedules. Mr. Ou attached three sets of work papers to the e-mail.

29. A review of A.V.S.'s audit log indicates that on March 23, 2001, Mr. Fitzgerald sent Mr. Ou an e-mail requesting copies of his worksheets revealing how the tax was computed.

30. In a March 26, 2001 e-mail, Mr. Ou informed Mr. Fitzgerald that, even though the attorneys had discussed a possible solution many times, there was no final agreement. He went on to explain that the civil fraud penalty and interest still needed to be collected on that portion of the tax which the subject had collected and, as part of the plea agreement, paid to the Division. As for the unsubstantiated exempt sales, Mr. Ou advised Mr. Fitzgerald that they were still in dispute. Mr. Ou further advised Mr. Fitzgerald that he would send detailed worksheets.

31. Mr. Fitzgerald had several communications with Mr. Ou about his tax computations. Mr. Ou's first set of work papers lists \$212,088.82 in sales tax due from A.V.S. on unsubstantiated exempt sales and \$4,662.81 in sales tax due from Steiger Boat on unsubstantiated exempt sales. Although Mr. Ou acknowledged getting records from A.V.S., he never indicated that little additional tax was due. Rather, he informed Mr. Fitzgerald that he had reviewed additional records that resulted in changes in sales tax due and the changes were reflected in his work. His second set of work papers lists \$123,750.05 in sales tax due from

A.V.S. on unsubstantiated exempt sales and \$4,662.81 in sales tax due from Steiger Boat on unsubstantiated exempt sales.⁵

32. In Mr. Ou's April 12, 2001 e-mail, he advised Mr. Fitzgerald that the fraud penalty should be assessed on the unresolved portion of the audits.

33. Review of the Division's audit logs reveals that Mr. Fitzgerald issued AU-346s and related worksheets to A.V.S. and Steiger Boat on April 16, 2001. Further review reveals that on May 14, 2001 copies of these documents were sent to Mr. Suchman. The logs also reveal that Mr. Suchman requested a meeting.

34. On June 14, 2001, Mr. Fitzgerald and his supervisor, William Sparke, met with Mr. Suchman to review Mr. Ou's work papers concerning the additional tax due from A.V.S. and Steiger Boat. During that meeting, Mr. Suchman did not identify any transactions that were exempt from sales tax. Rather, he claimed that no additional tax was due beside the amounts agreed upon in court. Mr. Fitzgerald asked petitioners to supply him with documents to support their unsubstantiated exempt sales. Mr. Suchman also stated additional information was given to Mr. Ou. After the meeting, Mr. Fitzgerald called Mr. Ou who confirmed that he had additional records. The notation in the audit log indicates that Mr. Fitzgerald agreed to call Mr. Ou back if he (Mr. Fitzgerald) planned on analyzing these records. Mr. Suchman did not contact Mr. Fitzgerald again to see how his review of petitioners' records was progressing. Nor did Mr. Fitzgerald contact Mr. Ou again.

35. On October 25, 2001, the Division issued a Notice of Determination to A.V.S., number L-020157840-5, asserting sales and use tax due in the amount of \$123,750.05 plus penalty in the amount of \$171,574.52 and interest in the amount of \$206,640.37 for a current

⁵ In the Schedule of Additional of Tax Due prepared by Mr. Fitzgerald, the sales tax due from A.V.S. is broken down as follows: \$96,533.79 in additional tax not charged plus \$27,216.26 in additional tax on unsubstantiated out-of-state sales.

balance due of \$501,964.94. On October 29, 2001, the Division issued a second Notice of Determination to A.V.S., number L-020157839-5, asserting sales and use tax due in the amount of \$182,663.34 plus penalty in the amount of \$231,246.59 and interest in the amount of \$267,748.60 less payment of \$182,663.00 for a current balance due of \$498,995.53. The computation section of each notice states that a fraud penalty of 50% of the tax plus 50% of the statutory interest under Tax Law § 1145 was being assessed.

36. On October 29, 2001, the Division issued two notices of determination to Steiger Boat. The first notice, number L-020174162-5, asserts sales and use tax due in the amount of \$4,662.81 plus penalty in the amount of \$14,640.73 and interest in the amount of \$4,618.85 for a current balance due of \$23,922.19. The second Notice of Determination, number L-020157841-4, asserts sales and use tax in the amount of \$58,432.32 plus penalty in the amount of \$54,194.82 and interest in the amount of \$51,354.75 less payment of \$58,432.00 for a current balance due of \$105,549.89. The computation section of each notice states that a fraud penalty of 50% of the tax plus 50% of the statutory interest under Tax Law § 1145 was being assessed.⁶

37. On November 15, 2001, Mr. Suchman sent a letter to Joseph Brooking, the Director of the Revenue Crimes Bureau, requesting the return of the documents that the Revenue Crimes Bureau had seized via subpoena from A.V.S. and Steiger Boat for the period June 1, 1990 through May 31, 1996. By letter dated December 19, 2001, Mr. Brooking informed Mr. Suchman that the subpoenaed records had been stored in the Revenue Crimes Bureau office at Two World Trade Center and were presumed destroyed. Tragically, Mr. Ou was killed during the terrorist attack on September 11, 2001.

⁶ The Division's Answer states that, with respect to Notice number L-020157841-4, in addition to the fraud penalty, it assessed a \$10,000.00 penalty against Steiger Boat under Tax Law § 1145(a)(3)(i) for failure to obtain a certificate of authority as required by Tax Law § 1134.

38. In December 2001, the Division provided Mr. Suchman with copies of A.V.S.'s sales journal for the period January 1993 through September 1994 and copies of A.V.S.'s cash receipts journal for the period January 1993 through December 1994. It also provided copies of Mr. Ou's work papers utilized to arrive at the audit adjustments.

39. The Division was able to secure some documents pertaining to A.V.S. and Steiger Boat from the Attorney General's Office. On January 15, 2002, Albert Coringrato, District Audit Manager at the Division's Suffolk District Office, sent a letter to Mr. Suchman. Enclosed with the letter was a packet of documents that Mr. Coringrato had obtained from the Attorney General's Office including sales invoices, resale certificates, assignment statements, testimonials and other various documents.

40. Petitioners filed requests for conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") and such conferences were scheduled. Mr. Fitzgerald met with his supervisors to analyze the documents that they had received from the Attorney General's Office. By letter dated March 18, 2002 addressed to Mr. Suchman, Mr. Fitzgerald proposed to reduce the tax asserted due from A.V.S. on the unsubstantiated exempt sales from \$123,750.05 to \$82,095.94. The adjustments were based on allowance of sales for resale to boat dealers, the elimination of duplicate invoices, the elimination of sales tax on trade-in amounts and the allowance of all out-of-state sales. Mr. Fitzgerald included detailed 28-page work papers that identified the specific invoices being adjusted.

41. In an April 29, 2002 e-mail to Mr. Coringrato, Mr. Fitzgerald states that he called Mr. Suchman and discussed the work papers with him. During this telephone conversation, Mr. Suchman stated that the additional tax due on A.V.S.'s unsubstantiated exempt sales was between \$12,000.00 and \$15,000.00.

42. After a conciliation conference, the conferee sustained the statutory notices issued to A.V.S. (L-020157839 and L-020157840) in an Order (CMS No. 190283) dated October 11, 2002. After a conciliation conference, the conferee also sustained the statutory notices issued to Steiger Boat (L-020157841 and L-020174162) in an Order (CMS No. 190284) dated October 11, 2002.

43. A.V.S. requested and received amnesty for Notice of Determination, number L-020157839-5, dated October 29, 2001. Steiger Boat requested and received amnesty for Notice of Determination, number L-020157841-4, dated October 29, 2001. These two amnesty notices concerned the sales tax collected but not remitted by petitioners.

44. A.V.S. filed a petition challenging the Notice of Determination asserting sales tax due in the amount of \$123,750.05 on unsubstantiated exempt sales. Steiger Boat filed a petition challenging the Notice of Determination asserting sales tax due in the amount of \$4,662.81 on unsubstantiated exempt sales.

45. In its brief, the Division has agreed to reduce the sales tax asserted in Notice of Determination, number L-020157840-5, issued to A.V.S. to \$82,095.94 - - the amount determined by Mr. Fitzgerald. All of A.V.S.'s transactions remaining in dispute pertain to sales to New York customers.

46. As noted above, the Division was able to secure some documents pertaining to A.V.S. and Steiger Boat from the Attorney General's Office. The record includes copies of 213 documents pertaining to A.V.S and Steiger Boat used by Mr. Fitzgerald to reduce the sales tax due from A.V.S. on unsubstantiated exempt sales. Specifically, these documents include, among other things, checks payable to A.V.S., numerous manufacturer's statements of origin for a boat sold by A.V.S., resale certificates, letters from customers, notes from customers, owner registration cards, an exempt use certificate, a retail installment contract, purchase agreements,

first assignments to customers and approximately 160 Steiger Craft sales invoices. Although A.V.S. received a copy of these documents in January 2002, it received another copy prior to the continued hearing on November 18, 2003.

47. Included among these documents is a memorandum written by Frank Palmieri to Mr. Steiger on April 12, 2000 concerning sales tax on the purchase of boats. In his memorandum, Mr. Palmieri states that boats were purchased in the fall of 1992 for “our boat rental business located at Windswept Marina.” He went on to state that when the boats were registered at the DMV as rental vehicles, no sales tax was paid. Rather, the DMV advised him to collect the tax on the rental service at the time of the sale. Mr. Palmieri did not identify the business that purchased the boats in 1992. Nor were sales invoices issued in the name of Frank Palmieri. A.V.S. did not provide any other information concerning this memorandum.

48. In support of his adjustments of the sales tax on A.V.S.’s unsubstantiated exempt sales, Mr. Fitzgerald prepared detailed work papers consisting of 28 pages which identified, among other things, each of A.V.S.’s sales invoices by customer, invoice date, invoice number, invoice amount, and additional tax. In addition, Mr. Fitzgerald also identified the sales invoices being adjusted, the amounts remaining in dispute based on the documents reviewed and all the other unsubstantiated exempt sales.

49. After his review of the documents secured from the Attorney General’s office, Mr. Fitzgerald determined that the amount of additional tax attributable to the disputed items totaled \$22,911.79. Mr. Fitzgerald disallowed the nontaxability claim on the following items.

Amount disallowed	Customer Name	Date of Transaction
1. \$1,490.16	Bobby Lyons	10-03-90
2. \$2,463.75	Steiger Craft/George Marshall	12-12-90
3. \$518.00	Goren	03-05-91
4. \$2,047.50	Steiger/LC Construct	06-14-91
5. \$14.65	A. J. Spas	01-10-92

6.	\$1,802.72	Jack Polo	01-30-92
7.	\$184.00	Polo Fishing Co.	03-30-92
8.	\$1,968.00	Addie Kenney	03-08-92
9.	\$12.88	Ferrigno Fishing	05-12-92
10.	\$80.00	Jack Polo/Polo Fishing	04-30-92
11.	\$34.80	Dr. Mike Ferrigno	05-27-92
12.	\$1,040.00	Dock Shoppe	07-24-92
13.	\$160.00	Dock Shoppe	07-24-92
14.	\$228.00	Dock Shoppe	07-31-92
15.	\$466.00	Dock Shoppe	07-31-92
16.	\$398.00	Dock Shoppe	08-06-92
17.	\$228.00	Dock Shoppe	08-14-92
18.	\$378.00	Anthony Rocco	03-30-93
19.	\$51.00	Ocean Rich Seafood	05-19-93
20.	\$2,819.88	Steven Singler	03-29-94
21.	\$2,125.00	Thomas Love	03-29-94
22.	\$136.57	Center Yacht Club	05-23-94
23.	\$97.30	Center Yatch [sic] Club	06-26-94
24.	\$552.00	Center Island Yatch [sic]	06-21-94
25.	\$54.85	Center Yacht Club	07-11-94
26.	\$552.00	Michael K. Laguardia	03-29-95
27.	\$2,936.75	Thomas B. Foley	04-07-95
28.	<u>\$71.40</u>	John Van Hardt	04-18-95
	\$22,911.79		

50. One of the disputed items is sales invoice number 3518, dated October 3, 1990, for customer Bobby Lyons; the amount of sales tax in dispute is \$1,490.16. The supporting document initially submitted is a letter, dated March 20, 2000, written by Robert Lyons, IV, on Lyons Fuel Oil Co., Inc. stationery. In this letter, Mr. Lyons states that on November 10, 1990, Lyons Fuel Oil registered and paid State sales tax on a 23-foot Steiger Craft Miami. A handwritten notation on this letter states that the invoice was issued in the name of Bobby Lyons, not Lyons Fuel.⁷ At the hearing, A.V.S. submitted into evidence a letter dated November 17, 2003 written by Sue Lyons, manager of Lyons Fuel Oil Co., Inc. Ms. Lyons wrote in pertinent part: “in response to your request for proof of payment of sales tax by us on a 23 ft Steigercraft [sic] in the fall of 1990. . . . we do not have the original canceled check. However, I can tell you

⁷ It is presumed that the author of this notation is Michael Ou.

that the sales tax was paid by our check #7436 in the amount of \$1513.18 (sales tax \$1490.18 plus \$23.00 registration fee).” Ms. Lyons included a copy of the original check stub.

51. According to the DMV records, Lyons Fuel Oil Co., Inc. has not registered a boat with the DMV since at least July 1988.

52. The record includes the resale certificate for Ocean Seafood. It was rejected because Ocean Seafood was not a registered sales tax vendor. The record includes the exemption certificate for Polo Fishing/Jack Polo which states as its exempt use “commercial fishing.” This exemption certificate was rejected because it was impossible to obtain any information about Polo Fishing.

53. During the period June 1, 1990 through May 31, 1996, on many occasions A.V.S.’s employees failed to obtain resale certificates or exemption certificates at the time of sales from those customers with whom they routinely dealt. On many occasions, A.V.S. issued sales invoices in an individual’s name rather than in the name of the corporation or organization for whom the purchase was actually being made.

54. On May 10, 1996, Mr. Steiger purchased a \$78,500.00 boat and A.V.S. failed to charge any sales tax on sales invoice number 3923 that it issued for the transaction. Review of Mr. Fitzgerald’s work papers indicate that the \$6,476.25 in sales tax due on this transaction is part of the additional tax determined to be due from A.V.S. on unsubstantiated exempt sales. A.V.S. did not provide any evidence about this transaction. Mr. Steiger also did not provide any information about this transaction.

55. A review of Mr. Fitzgerald’s work papers indicate that A.V.S. made repeat sales to many of its New York customers during the period in issue. Documents in the record establish that A.V.S. employed Thomas Love as its sales manager during the period in issue. Review of Mr. Fitzgerald’s work papers indicate that Mr. Love purchased a number of boats from A.V.S.

The sales to Mr. Love are among the unsubstantiated exempt sales at issue. A.V.S. has not provided any evidence concerning the sales to Mr. Love.

56. The record includes the detailed work paper of tax due on Steiger Boat sales prepared by Mr. Ou. A review of this work paper reveals that the \$4,662.81 in additional tax found due is from ten Steiger Boat sales invoices. Further review of the work paper reveals that Steiger Boat failed to charge sales tax on six sales invoices and the additional sales tax due on these six invoices totals \$2,478.49. A summary of the largest sale of the six sales invoices follows. On October 23, 1995, Hubbert L. Wells purchased a \$26,324.00 boat from Steiger Boat, which failed to charge the \$2,237.54 in New York sales tax due on sales invoice number 0006. On the four remaining invoices, Steiger Boat undercharged the amount of sales tax due on each sale. Steiger Boat did not present any evidence concerning any of its unsubstantiated exempt sales including the sale to Mr. Wells.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from “every retail sale” of tangible personal property. Tax Law § 1101(b)(4)(i) defines a retail sale as a sale to any person for any purpose “other than . . . for resale as such.” Tax Law § 1132(c)(1) provides in pertinent part as follows:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer . . . [U]nless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser’s name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser’s certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section

eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four, or (ii) the purchaser, not later than ninety days after the delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. . . .

B. Tax Law § 1115(a)(24) provides an exemption from sales tax for

Fishing vessels used directly and predominantly in the harvesting of fish for sale, and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs. For the purpose of this paragraph the term fishing vessel shall not include any vessel used predominantly for sport fishing purposes.

C. At issue in this matter is the sales tax due on petitioners' unsubstantiated exempt New York sales. Petitioners have the burden of showing that the amounts assessed are incorrect (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 464 NYS2d 451). Petitioners contend that the facts of this case warrant an adjustment in the burden of proof. They have not pointed out any New York case law in support of their argument. Rather, they claim that since the procedures found in the New York Tax Law are modeled after Federal provisions, Federal practice and case law may be looked to for guidance in analyzing procedural questions (*see, Matter of Schneier*, Tax Appeals Tribunal, November 9, 1989). Petitioners contend that the Court of Appeals for the Second Circuit, in *Andrew Crispo Gallery, Inc. v. Commissioner* (16 F3d 1336, 94-1 US Tax Cas ¶ 50,097), held that where the government is responsible for a taxpayer's inability to produce documents necessary to prove some aspect of the taxpayer's case, such circumstances are not the sort of misfortune that must be borne by a taxpayer, as it normally is in other cases, as a result of a failure of proof. Rather, the court held that two modifications are appropriate.

First, where the taxpayer's records have been seized and lost by the government, the trier should at least be permitted to infer that the true facts are as alleged by the taxpayer to be set forth in the documents seized and lost. Second, in those instances where the taxpayer can offer credible evidence that the seized and lost record was properly maintained by the taxpayer, prior to the seizure, and accurately reflected the facts that the taxpayer alleges it purports to reflect, the taxpayer is entitled to a presumption that the record would so reflect those alleged facts. (*Andrew Crispo Gallery, Inc. v. Commissioner, supra* at 1343 - 1344.)

D. Petitioners assert that, in the instant matter, much like *Andrew Crispo Gallery*, the Division is responsible for their inability to produce documents necessary to prove the sales to their New York customers are exempt from sales tax. They point out that the audit log verifies that in June 2001 Mr. Fitzgerald knew that Mr. Ou had additional documents that supported their claims that many of the sales were exempt from sales tax. Petitioners claim that, at the June 14, 2001 meeting, Mr. Fitzgerald told Mr. Suchman that he would get the documents from Mr. Ou and review them. They argue that but for the negligence of Mr. Fitzgerald these documents would have been at the Division's Suffolk District Office, rather than the World Trade Center where, unfortunately, they were destroyed. Since the loss of the documents is allegedly due entirely to the negligence of the Division, petitioners argue the modifications set forth in *Andrew Crispo Gallery* are appropriate. Without the lost records, petitioners argue that they are unable to properly defend their position and must rely on secondary, and not as accurate, evidence to support their position. They aver that it is virtually impossible to reconstruct the records because they do not have their customers' addresses. Petitioners claim they should not have to bear the brunt of the Division's negligence and at the very least, should be entitled to a greater inference that the facts, as set forth in their petitions and at trial, are true. Petitioners are not seeking to have the assessments cancelled. Rather, they request that the burden of proof be modified to reflect a level playing field.

The instant matter is distinguishable from *Andrew Crispo Gallery, Inc. v. Commissioner (supra)*. In *Andrew Crispo Gallery*, the I.R.S. seized the records and then lost them. In the

instant matter, the documents were voluntarily supplied to Mr. Ou on two separate occasions. In June 2001, Mr. Fitzgerald contacted Mr. Ou who confirmed that he had additional records. Mr. Fitzgerald credibly testified that he did not make a commitment to get the records from Mr. Ou. His audit log supports his version of what transpired. The documents were destroyed in the terrorist attack on the World Trade Center on September 11, 2001, not as a result of the Division's negligence.

There is also another distinction between *Andrew Crispo Gallery, Inc. v. Commissioner (supra)*, and the instant matter. In *Andrew Crispo Gallery*, the Tax Court failed to explain the nature of the deductions or recoveries which were in dispute. The lost records were needed to understand what precisely was at issue and thus, what proof was needed. In the present case, the audit work papers list all of petitioners' sales invoices and include, among other things, for each invoice, the name of the customer, the date of the transaction, the invoice number and the amount of the sale. In addition, in support of his adjustments of the sales tax on A.V.S.'s unsubstantiated exempt sales, Mr. Fitzgerald prepared 28 pages of work papers listing all of the transactions remaining at issue. Petitioners were given copies of these work papers. Notwithstanding the fact that they have had copies of these work papers for a long time, petitioners contend that they are unable to locate customers because they do not have their addresses. Petitioners' efforts at locating their customers are minimal. In January 2002, the Division returned to petitioners documents pertaining to A.V.S. and Steiger Boat including approximately 160 sales invoices listing customers' names and addresses. It is incredible that petitioners are unable to use these invoices to locate some of their customers. During the period in issue, one of A.V.S.'s employees, Thomas Love, purchased a number of boats from A.V.S. I find it surprising that Mr. Steiger is unable to locate Mr. Love and ask him to provide documentation concerning those sales which are part of the unsubstantiated exempt sales

remaining at issue. A review of the sales invoices at issue reveal that A.V.S. made repeat sales to many of its customers, therefore the number of customers who need to be located is reduced. In addition, A.V.S. has failed to explain why Mr. Steiger did not provide any documentation concerning his purchase of a boat. Surely A.V.S. could locate Mr. Steiger without the sales invoice. Furthermore, at the hearing, petitioners did not explain what efforts, if any, they made to try to locate their customers. For all of the above reasons, the burden of proof does not shift to the Division.

E. At the hearing, A.V.S. submitted a document in support of only one unsubstantiated exempt sale, the sale to Bobby Lyons, on October 3, 1990, bearing invoice number 3518. The document, a letter written by Sue Lyons, states that Lyons Fuel Oil Co., Inc., paid sales tax on a 23-foot Steiger Craft boat by its check # 7436 in the amount of \$1,513.18 representing sales tax in the amount of \$1,490.18 plus a \$23.00 registration fee. The cancelled check was not included, only a copy of the original check stub. A.V.S. has failed to prove that the sales tax has been paid on this sale. The original check stub is not sufficient proof of payment of sales tax.

Furthermore, according to DMV records, Lyons Fuel Oil Co., Inc. has not registered a boat with the DMV since July 1988. I have reviewed the work papers and the sales invoices and I am unable to determine what transactions Mr. Palmieri's memorandum refers to and supports. As noted in the Findings of Fact, the exemption certificate issued by Polo Fishing/Jack Polo was rejected. A.V.S. has not submitted any evidence to support a finding that the sales to either Mr. Polo or Polo Fishing were for commercial fishing purposes, rather than sports fishing purposes. Therefore, the Division's rejection of the exemption certificate was proper (*see*, Tax Law § 1115[a][24]). With respect to the remaining documents, A.V.S. has offered no explanation of them. A.V.S. failed to present any evidence concerning the remaining unsubstantiated exempt sales.

It is noted that much of the predicament that A.V.S. finds itself in now can be traced directly to its failure to obtain resale and exemption certificates from its customers at the time of the original sales. A.V.S. has failed to prove that the remaining sales at issue were exempt from sales tax (*see*, Tax Law § 1132[c][1]). Accordingly, the Division's determination of additional tax as adjusted by Mr. Fitzgerald was proper.

F. As noted in the Findings of Fact, the \$4,662.81 in additional tax found to be due from Steiger Boat is from unsubstantiated exempt sales that are identified in ten Steiger Boat sales invoices. Steiger Boat failed to submit proof that any of the ten sales were exempt from sales tax (*see*, Tax Law § 1132[c][1]). Therefore, the Division's determination of additional tax due from Steiger Boat on its unsubstantiated exempt sales was proper.

G. Tax Law § 1145(a)(2) provides in pertinent part:

If the failure to pay or pay over any tax to the commissioner of taxation and finance within the time required by this article is due to fraud, in lieu of the penalties and interest provided for in subparagraphs (i) and (ii) of paragraph one of this subdivision, there shall be added to the tax (i) a penalty of fifty percent of the amount of the tax due, plus (ii) interest on such unpaid tax

Whether petitioners fraudulently failed to pay sales tax to the Division or filed willfully false or fraudulent returns with the intent to evade payment of tax are questions of fact to be determined upon consideration of the entire record (*Jordan v. Commissioner*, 52 TCM 234; *Matter of Drebin v. Tax Appeals Tribunal*, 249 AD2d 716, 671 NYS2d 565). The burden of demonstrating this falls upon the Division (*Matter of Sona Appliances*, Tax Appeals Tribunal, March 16, 2000). Fraud is not defined in Tax Law § 1145. However, a finding of fraud requires the Division to show "clear, definite, and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (*Matter of Sona Appliances, supra*). In order to establish fraudulent intent, petitioners, acting

through their officers, must have acted deliberately, knowingly and with the specific intent to violate the Tax Law (*Matter of Cousins Serv. Sta.*, Tax Appeals Tribunal, August 11, 1988).

The sales tax penalty provisions are modeled after Federal penalty provisions and, thus, Federal statutes and case law may properly provide guidance in ascertaining whether the requisite intent for fraud has been established (*Matter of Uncle Jim's Donut & Dairy Store*, Tax Appeals Tribunal, October 5, 1989). Since direct proof of a taxpayer's intent is rarely available, fraud may be proved by circumstantial evidence, including the taxpayer's course of conduct (*Intersimone v. Commissioner*, 53 TCM 1073; *Korecky v. Commissioner*, 781 F2d 1566, 86-1 US Tax Cas ¶ 9232). Relevant factors held to be significant include consistent and substantial understatement of tax, the amount of the deficiency itself, the existence of a pattern of repeated deficiencies and the taxpayer's entire course of conduct (*see, Merritt v. Commissioner*, 301 F2d 484, 62-1 US Tax Cas ¶ 9408; *Bradbury v. Commissioner*, 71 TCM 2775; *Webb v. Commissioner*, 394 F2d 366, 68-1 US Tax Cas ¶ 9341; *see also, Matter of AAA Sign Co.*, Tax Appeals Tribunal, June 22, 1989).

H. Mr. Steiger's guilty plea to committing grand larceny in the third degree estops petitioners from contesting that they committed tax fraud during the period in issue. The plea was to one count of an information charging Mr. Steiger with stealing property from the New York State Department of Taxation and Finance. Specifically, Mr. Steiger admitted that he failed to remit the sales tax to the Division collected by petitioners during the period June 1, 1990 through May 31, 1996. There is simply no doubt that Mr. Steiger's actions were fraudulent and that his actions alone meet the *Sona Appliances* requirements. Petitioners are estopped from arguing that the fraud penalty in this matter was improperly asserted (*see, Matter of DeFeo*, Tax Appeals Tribunal, April 22, 1999; *Matter of T. Management, Inc.*, Tax Appeals Tribunal, April 12, 2001)

I. Even if estoppel does not exist, the criminal conviction remains relevant as to the fraud issue (*see, Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). During the plea proceedings, Mr. Steiger admitted that he knowingly failed to remit sales tax collected and due the Division. Since he was the president and sole stockholder of both A.V.S. and Steiger Boat, his knowledge and actions are imputed to petitioners.

The record contains compelling evidence of fraud. At the outset of A.V.S.'s audit, Messrs. Steiger and Suchman admitted that the corporation had collected sales tax but had not remitted these funds to the Division. Later, Mr. Suchman admitted that Steiger Boat had collected sales tax but had not remitted these funds to the Division. At an audit appointment, Mr. Steiger admitted that petitioners used the sales tax to pay other creditors. He also admitted that petitioners did not file the sales tax returns because they did not want the Division to file any tax warrants. These admissions are sufficient to establish that petitioners committed tax fraud (*see, Matter of Uncle Jim's Donut & Dairy Store, supra*). In addition to failing to file sales tax returns, A.V.S. failed to file withholding tax returns for the period June 1, 1990 through May 31, 1995. Steiger Boat did not register as a sales tax vendor and did not file New York franchise tax reports and withholding tax returns for the period June 1, 1995 through May 31, 1996.

Petitioners contend that they were not willful and did not intentionally defraud the government by failing to collect tax they thought was not due. They argue that Mr. Steiger did not discover A.V.S.'s tax remittance problem until 1993. Petitioners blame A.V.S.'s former bookkeeper, Ms. Waller, for the failure to remit the sales tax due for the period June 1, 1990 until her departure in the summer of 1993. They claim that, as soon as Mr. Suchman pointed out to A.V.S. that it was in default of filing and paying its taxes, Mr. Steiger made every effort to raise financing to satisfy the liabilities and made every effort to rectify the situation. Petitioners' arguments are without merit. The record clearly shows that Mr. Steiger ultimately decided

which creditors were paid during the entire period in issue (June 1, 1990 through May 31, 1996). In addition, Mr. Steiger pled guilty to grand larceny in the third degree. In the plea proceedings, he admitted that he failed to remit the sales tax collected by petitioners during the period June 1, 1990 through May 31, 1996. A.V.S. continued to fail to remit the sales tax collected through May 31, 1996 - - long after Ms. Waller left A.V.S.'s employ. Although Steiger Boat was not incorporated until June 1995, it failed to register as a sales tax vendor and also failed to remit the sales tax collected for the period June 1, 1995 through May 31, 1996. Indeed, Mr. Suchman testified that petitioners did not file sales tax returns in part because the filings would bring attention to earlier periods during which sales tax had been collected but not remitted. It is clear from petitioners' actions that they wanted to conceal their business activities from the Division and evade their tax liabilities.

During the period June 1, 1990 through May 31, 1996, petitioners acted willfully, knowingly and intentionally in a manner that resulted in a deliberate nonpayment of taxes due and owing (*see, Matter of Sona Appliances, supra*). Accordingly, I find that the Division has sustained its burden of showing by clear and convincing evidence that petitioners possessed the intent necessary to support the imposition of the fraud penalty.

J. The petition of A.V.S. Laminates, Inc. is denied and the Notice of Determination (number L-020157840-5) issued on October 25, 2001 as modified by Finding of Fact "45" is sustained. The petition of Steiger Boat Sales, Inc. is denied and the Notice of Determination (number L-020174162-5) issued on October 29, 2001 is sustained.

DATED: Troy, New York
November 4, 2004

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE